

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

LIGHTHOUSE OYSTERS, INC., an Oregon Corporation,
APPELLEE.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the
United States for the District of Oregon.

FILED

SEP 12 1945

PAUL P. O'BRIEN,
CLERK

ALTON JOHN BASSETT,
Attorney for Appellee.

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STATEMENT OF FACTS

The appellee adopts the Statement of Fact of the appellant as to all things but the last paragraph of the statement which appears on page 8 of Appellant's Brief.

The appellee contends that the Court was not only justified, but required to find in the amount it did find, even though it held for the appellant, because of the plaintiff's own representations. We refer specifically to two matters. First, the appellant sued for \$3150.25 (disregarding for the purpose of this argument treble damages), and then at the opening of the trial obtained the Court's leave to amend by reducing that figure to \$2047.49. See page 2 of Transcript of Hearing. Second, the statements of both counsel, and the uncontradicted testimony of the defendant convinced the court that the defendant was entitled to 2¢ per pound to compensate him for the cost to him of freight and boxing—a charge that is as old as the fish business—and which is allowed by the regulation. This matter occurs on pages 61 to 65, Transcript of Hearing.

Then when the Court found against the defendant for overcharges prior to November 9, 1943, the plaintiff's exhibit was employed to indicate that those overcharges were not more than \$974.49, and that 36,095 pounds of fish had been sold prior to November 9, 1943, which multiplied by 2¢ per pound entitled the defendant to a credit of \$721.90 and reduced the overcharge to \$252.59, which he tendered to the plaintiff.

POINTS AND AUTHORITIES

The defendant was not guilty of a willful violation of any of the requirements of the Act.

ARGUMENT

It has been impossible for fish dealers on the Pacific Coast to avoid technical violations. The fish business is complex, the species are countless, and the Regulations under the Act are myriad. Counsel for the Administrator stated (beginning on bottom of page 21, Transcript of Record) that "Regulation 418 has very carefully spelled out the requirements for keeping record by those who buy fresh fish and sea food and those who sell it." We seriously suggest, without any intention to be facetious, that Regulation 418, and many other regulations, have been "spelled out" too "carefully". It has been estimated that more than 75,000 printed pages of regulations and requirements and instructions have been circulated officially by the O.P.A., to "spell out" what the Act means.

An example of what we don't believe to be humanly possible for two fish dealers to agree on the meaning of is the following order No. G-103:

“OFFICE OF PRICE ADMINISTRATION
SAN FRANCISCO REGIONAL OFFICE

REGION VIII

ORDER NO. G-103 UNDER SECTION 1499.18(c), AS
AMENDED OF THE GENERAL MAXIMUM PRICE
REGULATION.

COOKED LOBSTER

For the reasons set forth in an opinion issued simultaneously herewith, and under the authority vested in the Regional Administrator of the Office of Price Administration by Section 1499.18 (c) of the General Maximum Price Regulation, it is hereby ordered:

(a) The maximum price of sales of cooked lobster by processors in Region VIII, shall be as follows:

(1) For sales by any producer-processor, except at retail, the maximum price in San Diego, California, shall be \$.305 per pound for cooked lobster 10½" to 13½" in length, and \$.2325 per pound for cooked lobster of more than 13½" in length. In any other locality in Region VIII, the maximum price shall be the price specified in this paragraph plus freight from San Diego, California, to the purchaser's business location.

(2) For sales by any wholesaler-processor to wholesalers other than wholesaler-processors, the maximum price shall be as follows:

(i) When sold to wholesalers located in San Diego, Calif., \$.3425 per pound for lobster of 10½" to 13½" in length, and \$.2650 per pound for lobsters of more than 13½" in length.

(ii) When delivered to localities in Region VIII other than San Diego, California, the prices specified in sub-paragraph (i) above, plus freight from San Diego, California, to the buyer's customary receiving point.

(3) For sales by wholesaler-processors to individual retail stores, purveyors of meals, and industrial, commercial or institutional users, the maximum price shall be as follows:

(i) When undelivered at San Diego, \$.38 per pound for lobsters $10\frac{1}{2}$ " to $13\frac{1}{2}$ " in length, and \$.295 per pound for lobsters of more than $13\frac{1}{2}$ " in length.

(ii) When undelivered in any other locality in Region VIII, the applicable price as specified in sub-paragraph (i) above, plus freight from San Diego, California, to the selling wholesaler-processor's place of business.

(iii) When delivered by common carrier, to the premises of the buyer, the applicable price as specified in sub-paragraph (i) and sub-paragraph (ii) above, plus actual transportation charges to the premises of the buyer."

Neither was it possible for just two employees of the O.P.A. in the same office to agree on their own regulation; and that is why at the opening of the trial the appellant amended its complaint to demand \$2047.49 instead of \$3150.25. That is a difference of \$1102.76 or more than 35%, a rather substantial mistake—and it wasn't a mistake in accounting which even a careful accountant might make, it was a difference between what two employees of the O.P.A. thought the regulations meant.

This defendant knows that both employees can't be right but he knows that both of them might be wrong and that he and his books might be right.

This defendant did not wilfully violate the regulations, if he violated them at all, because the O.P.A.

investigator (Holdt) testified that the defendant was "cooperative" and "helped you all he could". (Transcript of Record, page 47.)

Another serious difficulty in the path of any fish dealer in observing the innumerable and complicated regulations is the almost incredible factors that affect the sale of a single type of fish. A salmon, for example, and we don't pretend to instance all of the factors, could have its price affected by the following factors:

#1: Chinook Salmon caught in the Columbia River:

If from January through March and sold Round the price would range from $22\frac{1}{2}$ to 27¢ according to classification of customer.

If sold Drawn (Dressed with Heads left on) the price range would be 27 to $31\frac{1}{2}$ ¢.

If sold Dressed (Headless) the range could be 30 to 34¢.

If sold Sliced or Filletted the range could be 34 to 39¢.

If caught from April through December all the above figures would be different.

#2: If caught in the Sacramento River the price conditions would be about the same as from the Columbia River except for probable extra freight expense from point of origin to point of shipment, and the higher freight rate from point of shipment to destination.

#3: If caught in Puget Sound the price schedules would be entirely different due to an arbitrary set-up of prices for that area.

#4: If Troll or Ocean caught the schedules would again be different.

- #5: River caught Chinook salmon will shrink in dressing from 18% in early spring to 24% by September 10th, and 32% by early October.
- #6: Any of these Chinook Salmon frozen will undergo certain chemical changes that also change the skin color, and it is extremely difficult for even an expert to distinguish between one species of frozen Chinook and another. Even the color of the meat, and the texture, often change greatly in the freezing process.

We believe that the war emergency required a curb against inflation. But we also believe that it was the intention of Congress—the entire discussion prior to the enactment of the statute as printed in the Congressional Record—to place a ceiling on prices of commodities to the ultimate consumer, without trying to regulate the production or manufacture of the commodity from its native form to the consumer. It is our belief that the objective of this Act, as it relates to the industry here concerned—sea foods—would have been attained better by placing a retail ceiling on a pound of salmon, and by permitting Free Enterprise to work out a distribution of profit on that pound of salmon from the ocean to the table.

The Court did not err in allowing 2 cents a pound credit on overcharges prior to November 9, 1943.

The Regulation then and now allows for actual transportation charges. The defendant testified (Transcript of Record, page 91) "that he paid transportation charges on a good 90 per cent of it, unless we send our truck sometimes during the Celilo." In which event, of course, he paid his transportation charges in another way.

We submit that while our treatment by the O.P.A. employees was uniformly courteous and fair—as they saw it—it was not in conformity with the Regulations and the judgment should be affirmed.

ALTON JOHN BASSETT,

Attorney for Appellant.